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10 *Hartford Fire Insurance Co.*

11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

13 **MASON AND DIXON INTERMODAL, INC.**
14 **Plaintiff,**

15 **v.**

16 **LAPMASTER INTERNATIONAL, LLC and**
17 **HARTFORD INSURANCE CO.**
18 **Defendants.**

19 **HARTFORD FIRE INSURANCE CO,**
20 **individually and as subrogee of Lapmaster**
21 **International, LLC,**

22 **Counterclaimant,**

23 **v.**

24 **MASON AND DIXON INTERMODAL, INC.**
25 **Counterclaimant.**

Case No. CV-08-1232-VRW

**HARTFORD FIRE INSURANCE
COMPANY'S OPPOSITION TO W.E.ST.
FORWARDING SERVICES' MOTION
TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY
JUDGMENT, AND TO ITG
TRANSPORTATION SERVICES, INC.'S
JOINDER IN SAME; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*(assigned to the Honorable Vaughn R.
Walker)*

Date: September 11, 2008
Time: 2:30 p.m.
Dept.: 6

26 COMES NOW Defendant, Counterclaimant and Third-Party Plaintiff, Hartford Fire
27 Insurance Company and hereby responds to W.E.S.T. Forwarding Services' Motion to Dismiss or
28 in the Alternative for Summary Judgment and to ITG Transportation Services, Inc's Joinder in
Same as follows:

///

1 **MEMORANDUM OF POINTS AND AUTHORITIES:**

2 **I. BRIEF FACTUAL BACKGROUND:**

3 This matter arises out of two separate trucking accidents that occurred on Interstate 880 in
 4 Oakland, California. Mason and Dixon Intermodal, Inc. ("Mason and Dixon"), the trucking
 5 company whose two drivers separately collided with the overpass, brought a declaratory relief
 6 action against Lapmaster International, LLC ("Lapmaster"), the owner/seller of a lapping machine
 7 and a polishing machine that were damaged in the accidents, and Hartford Fire Insurance
 8 Company ("Hartford"), the insurance carrier whom indemnified Lapmaster following the
 9 accidents. Mason and Dixon contends that the Carriage of Goods by Sea Act ("COGSA") applies
 10 thus limiting its liability to Lapmaster and Hartford for the \$820,000 in damages caused by Mason
 11 and Dixon's drivers.

12 Lapmaster and Hartford filed Third-Party Complaints against WEST Forwarding Services,
 13 Inc. ("WEST") and ITG Transportation Services, Inc. ("ITG") for their role in the transaction.
 14 WEST, in turn, filed a counterclaim against Mason and Dixon, also in this judicial district. Upon
 15 answering the third party complaint and filing its counterclaim against Mason and Dixon, WEST
 16 filed a motion to dismiss arguing that Lapmaster and WEST consented to the jurisdiction of the
 17 U.S. District Courts and the State Courts of Ohio. ITG subsequently joined the motion.

18 **II. THIRD-PARTY DEFENDANTS ARE INDISPENSIBLE:**

19 WEST and ITG are indispensable parties to this litigation. Both entities were involved in
 20 arranging for the ground transportation at issue, including the terms and insurance for the same.
 21 Federal Rule of Civil Procedure 14, which governs third-party practice, allows a third party
 22 complaint to be served upon a person not a party to the action who is or may be liable to the third-
 23 party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. Fed.R.Civ.P.
 24 14(a). The purpose of Rule 14 is to permit additional parties whose rights may be affected by the
 25 decision in the original action to be joined so as to expedite the final determination of the rights
 26 and liabilities of all the interested parties in one suit. *American Zurich Ins. Co. v. Cooper Tire &*
 27 *Rubber Co.*, 512 F.3d 800, 805 (C.A.6 (Ohio),2008).

28 Here, the third-party defendants seek to transfer a portion of the litigation to Ohio, which

1 defeats the very purpose of Rule 14, Fed.R.Civ.P. Specifically, WEST and ITG are asking this
 2 Court to parcel out the litigation, keeping Mason and Dixon's declaratory relief action in the
 3 Northern District of California and transferring the third-party complaints, which derive from the
 4 same facts and events, to Ohio. Although not clear, WEST presumably desires to maintain its
 5 counterclaim against Mason and Dixon in the Northern District of California. The proposed
 6 piecemeal litigation flies in the face of common sense, judicial economy and convenience to the
 7 witnesses, the parties and their attorneys.

8 **III. VENUE PROPER IN NORTHERN DISTRICT OF CALIFORNIA:**

9 **A. TRUCKING ACCIDENT OCCURRED IN NORTHERN DISTRICT OF CALIFORNIA.**

10
 11 There is no question that venue in the Northern District of California is proper absent the
 12 forum selection clause contained in the "Customs Power of Attorney," attached as Exhibit A to
 13 Declaration of Clarie Goldenberg. WEST is a corporation and deemed to reside in any judicial
 14 district which it is subject to personal jurisdiction.¹ See 28 U.S.C.A. § 1391(c). Whether subject
 15 matter jurisdiction is found in diversity (subsection a) or federal question (subsection b), venue is
 16 appropriate in Northern District of California inasmuch as the accident giving rise to the damages
 17 occurred in the judicial district.

18 28 U.S.C.A. § 1391 provides:

19 (a) A civil action wherein jurisdiction is founded only on diversity of citizenship
 20 may, except as otherwise provided by law, be brought only in (1) a judicial district
 21 where any defendant resides, if all defendants reside in the same State, (2) a judicial
 22 district in which a substantial part of the events or omissions giving rise to the
 23 claim occurred, or a substantial part of property that is the subject of the action is
 situated, or (3) a judicial district in which any defendant is subject to personal
 jurisdiction at the time the action is commenced, if there is no district in which the
 action may otherwise be brought.

24 (b) A civil action wherein jurisdiction is not founded solely on diversity of
 25 citizenship may, except as otherwise provided by law, be brought only in (1) a

26
 27 ¹ Although WEST's motion mentions that the "court lacks personal jurisdiction" (see Motion to Dismiss, 3:6-8, 3:13-
 28 15), WEST fails to provide any facts or argument why it is not subject to personal jurisdiction in this Court and the
 motion deals only with venue and the forum selection clause. Notwithstanding, WEST is a customs house broker and
 an international freight forwarder (see Motion to Dismiss, 3:18-19) and certainly minimum contacts exist sufficient to
 subject WEST to personal jurisdiction.

1 judicial district where any defendant resides, if all defendants reside in the same
 2 State, (2) a judicial district in which a substantial part of the events or omissions
 3 giving rise to the claim occurred, or a substantial part of property that is the subject
 4 of the action is situated, or (3) a judicial district in which any defendant may be
 found, if there is no district in which the action may otherwise be brought. 28
 U.S.C.A. § 1391.

5 The transportation of a lapping machine and a polishing machine between the Port of Oakland
 6 and a business (non-party to this lawsuit) located in Fremont, California is the basis of this case.
 7 The machines were damaged on southbound I-880 in Oakland after colliding with the 23rd Avenue
 8 overpass. Venue is thus proper in this judicial district based on 28 U.S.C.A. § 1391(a)(1) and (2)
 9 and § 1391(b)(1) and (2).

10 **B. DISTRICT COURTS HAVE DISCRETION WHETHER TO TRANSFER A**
 11 **CASE TO ANOTHER VENUE, AND PRESENCE OF A FORUM SELECTION**
 12 **CLAUSE IS MERELY ONE FACTOR FOR THE COURT TO CONSIDER:**

13 Despite the title to WEST's motion, transfer, rather than dismissal, is the appropriate remedy.
 14 As addressed above, Northern District of California is an appropriate venue for this civil action to
 15 have been brought. 28 U.S.C.A. § 1404(a) provides: "For the convenience of parties and
 16 witnesses, in the interest of justice, a district court **may** transfer any civil action to any other
 17 district or division where it might have been brought" (emphasis added). District courts are
 18 provided with the discretion to adjudicate motions for transfer according to an "individualized,
 19 case-by-case consideration of convenience and fairness." *Stewart Organization, Inc. v. Ricoh*
 20 *Corp.*, 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2244 (U.S. Ala., 1988), citing *Van Dusen v. Barrack*,
 21 376 U.S. 612, 622, 84 S.Ct. 805, 812 (1964). Contrary to WEST's motion, a forum selection
 22 clause contained in an agreement between parties is not the end of the analysis. As stated by the
 23 Supreme Court:

24 A motion to transfer under § 1404(a) thus calls on the district court to weigh in the
 25 balance a number of case-specific factors. The presence of a forum-selection clause
 26 such as the parties entered into in this case will be a significant factor that figures
 centrally in the district court's calculus.

27 The flexible and individualized analysis Congress prescribed in § 1404(a) thus
 28 encompasses consideration of the parties' private expression of their venue
 preferences. *Stewart Organization*, 487 U.S. at 29-30.

Here, WEST seeks to enforce a clause contained in an adhesion contract labeled “Governing Law: Consent to Jurisdiction and Venue.” (See Exhibit A to Declaration of Clarie Goldenberg). The parties’ agreement as to venue, as expressed in a forum selection clause for example, should receive neither dispositive consideration nor no consideration. *Stewart Organization*, 487 U.S. at 31. Similarly, plaintiff’s choice of forum is a relevant factor for the court’s consideration. *Id.* The district court must also weigh in the balance of witness convenience and those public-interest factors of systemic integrity and fairness that come under the headings of “the interests of justice.” *Stewart Organization*, 487 U.S. at 30.

Transferring the third-party complaints to Ohio is nonsensical. Venue in Ohio is completely arbitrary. Transferring Lapmaster and Hartford’s Third Party Complaints to Ohio serves absolutely no purpose and is not convenient for any of the parties. No witnesses are, or were at the time of the transaction, located in Ohio. The parties’ disclosure statements (pursuant to FRCP 26) do not identify one person with knowledge residing in Ohio. None of the parties to the action are located in Ohio, nor are any of the attorneys of record. Lapmaster and WEST are both Illinois companies. See Lapmaster Third Party Complaint, ¶ 4 and WEST’s Counterclaim against Mason and Dixon, ¶ 3. This case involves two separate trucking accidents occurring in Northern California. The damaged equipment has never been to or through Ohio, nor were arrangements for the ground transportation of the equipment from Oakland to Fremont, California made within Ohio.²

More importantly, transferring the third-party complaints to Ohio divides the litigation into two districts, California and Ohio. WEST proposes to keep the main litigation in Northern District of California, and then litigate the third-party complaints against WEST in Ohio. Even more preposterous, WEST proposes that plaintiffs’ third-party complaints be litigated in Ohio while the main litigation including WEST’s counterclaim against Mason and Dixon be decided in

² Emails exchanged between ITG and WEST regarding the ground transportation involved individuals located within Illinois according to the email “signature”

1 California. This would require WEST to litigate in two different forums; prosecuting its
2 counterclaim in California and defending plaintiffs' third-party complaints in Ohio.

3 The discovery and legal issues are the same in the main litigation and plaintiffs' third-party
4 complaints. Allowing identical issues to be decided by different tiers of fact inevitably results in
5 discovery disputes and inconsistent holdings. Pursuant to order of the court, the parties have
6 preliminarily identified the depositions that need to occur before the dispositive motion hearing set
7 for December 18, 2008. These depositions have bearing on both actions (main action and third-
8 party complaints). Should the court transfer the third-party complaints to Ohio, which court
9 (California or Ohio) should hear and resolve a discovery dispute? What if both parties petition the
10 two district courts for a protective order or an order to compel? These questions are just a few
11 examples of why enforcing the forum selection clause and piecemealing the litigation is
12 unreasonable and unjust.

13 **C. TRANSFER, NOT DISMISSAL, IS APPROPRIATE:**

14 Dismissal, as it relates to venue, is only proper if the action is in the "wrong" district. As
15 discussed above, however, venue is not improper or "wrong" in the Northern District of
16 California. *See* 28 U.S.C.A. § 1391(a)(1) and (2) and § 1391(b)(1) and (2). Section 1406(a)
17 provides: The district court of a district in which is filed a case laying venue in the **wrong**
18 division or district shall dismiss, or if it be in the interest of justice, transfer such case to any
19 district or division in which it could have been brought. 28 U.S.C.A. § 1406(a) (emphasis added).
20 Because venue was proper where the third-party complaints were filed, WEST's motion to dismiss
21 should be denied. The proper motion would have been one requesting a transfer of venue,
22 although that motion would also fail as addressed in the preceding section.

23 Even assuming, *arguendo*, the Court finds that the subject forum selection clause is not
24 unreasonable or unjust (*See Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972)),
25 and that the third-party complaints were filed in the "wrong" district, the interest of justice dictates
26 that the Court transfer the third-party complaints to Ohio, not dismiss them. *Roberson v.*
27 *Norwegian Cruise Line*, 897 F.Supp. 1285 (C.D.Cal.1995); *Russo v. Ballard Medical Products*,
28 352 F.Supp.2d 177 (D.R.I.2005) (Transfer, rather than dismissal provides all parties with an

1 opportunity for a speedy resolution of the matter, and provides for a more efficient use of judicial
2 resources.); Lafferty v. St. Riel, 495 F.3d 72 (C.A.3 (Pa.) 2007).

3 **D. VENUE IS NOT DECIDED BY SUMMARY JUDGMENT**

4 Although requested, WEST's motion for summary judgment fails for the same reasons that
5 its motion to dismiss fails. WEST's motion does not comply with Fed.R.Civ.P. 56(c), does not
6 contain a separate statement of material facts and fails to even identify the legal basis for summary
7 judgment when venue is challenged. WEST fails to demonstrate that there is a genuine issue of
8 material fact undisputed and, therefore, WEST is not entitled to judgment as a matter of law.

9 **IV. CONCLUSION:**

10 The motions of WEST and ITG must be denied. ITG and WEST are indispensable parties.
11 The forum selection clause contained in an adhesion contract is but one factor for this Court to
12 take into consideration. The Court should exercise its discretion and keep the action in one piece,
13 thus rejecting the attempt to transfer the third-party complaints to Ohio where no parties, attorneys
14 or witnesses reside.

15
16 Dated: August 21, 2008

By: **BAUMAN LOEWE WITT & MAXWELL, PLLC**

17
18 /s/ Christopher J. Brennan
19 *Attorneys for Hartford Fire Insurance Co.*

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